89-270

No. 89-____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

JOHN RICHARDSON,

Petitioner,

v.

CITY OF CHICAGO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

When persons are incarcerated for several days, without the filing of charges and without presentment to a judicial officer pursuant to an explicit, written municipal policy, the sole purpose of which it so permit police to try to build a case,

Is a person who was held in custody for three days because of that policy and who seeks money damages prohibited under *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) from seeking for a class a declaratory judgment as to the constitutionality of the policy?

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Petitioner John Richardson, on behalf of the class certified by the district court,[1] respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on February 21, 1989.

1. The class was defined as "all persons who from August 17, 1978 to the time of entry of judgment were held in custody without the filing of charges pursuant to Section 6, paragraph C-2 of General Order 78-1 of the Chicago Police Department." (App. 26.)

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-19) is reported at 868 F.2d 959 (7th Cir. 1989).[2] The opinions of the district judge denying motion to dismiss (App. 22, 23-25) and certifying the case as a class action (App. 26-29) are unreported. The opinion of the district court on the merits (App. 30-41) is reported at 638 F.Supp. 186 (N.D.Ill. 1986).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (App. 20) was entered on February 21, 1989; petitioner's timely petition for rehearing was denied by the court of appeals on May 12, 1989. (App. 21.)

CONSTITUTIONAL PROVISION AND RULES

This case involves Section 2, Clause 1 of Article III of the Constitution of the United States:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all

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2. The case was decided by the Court of Appeals together with the appeal from *Doulin v. City of Chicago*, 662 F.Supp. 318 (N.D.Ill. 1986), a challenge to another post-arrest detention policy. A petition for writ of certiorari in *Doulin*, which focuses on the availability of class injunctive relief, is being filed contemporaneously with the petition in this case.

> Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

This case also involves Rule 23(b)(2) of the Federal Rules of Civil Procedure:

> **(b) Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
> * * *
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

STATEMENT

Petitioner Richardson brought suit in the district court under 42 U.S.C. §1983 complaining that he had been arrested without a warrant and held by the police for three days while the police sought to build a case against him.[3]

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3. Richardson was arrested on July 18, 1981 as a suspect in a murder-arson. (App. 2.) Albert Robinson and Willie Moore, who joined with petitioner as co-plaintiffs, were brought in for questioning and held overnight after they had been named by Richardson as alibi witnesses. The claims of Robinson and Moore do not involve the municipal policy challenged by Richardson and are not at issue here.

Petitioner alleged that he had been held because of an explicit investigative detention policy of the City of Chicago set out in Section 6, Paragraph C-2 of Police Department General Order 78-1. (App. 31.) This written rule established a procedure for arrestees to be held in a police station so that the police "may continue investigation" (App. 38.) Rather than appearing before a judge for the filing of charges and a probable cause hearing, petitioner was held for three days under this policy while the police sought to build a case against him.[4] Petitioner challenged this detention policy on the ground that it authorized "extended detention, in violation of fourth amendment rights." (App. 38.)

Plaintiff sought money damages for himself and a declaratory judgment of the illegality of the "hold past court call" policy on behalf of a class under rule 23(b)(2) of the Federal Rules of Civil Procedure. The district court held that plaintiff had standing to seek a declaratory judgment for others similarly situated, reasoning that the case was capable of repetition, yet evading review. (App. 24.)

On petitioner's motion for class certification, the district court found that the case satisfied each of the requirements of Rule 23(a) of the Federal Rules of Civil Procedure (App. 27-29) and concluded that certification was appropriate under Rule 23(b)(2) because "plaintiff seeks declaratory relief in favor of himself and those similarly situated." (App. 29.) The district court ordered that the case proceed on behalf of

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4. After being held for three days, petitioner was formally charged with an arson-murder; petitioner was acquitted following trial.

"all persons who from August 17, 1978 to the time of entry of judgment were held in custody without the filing of charges pursuant to Section 6, paragraph C-2 of General Order 78-1 of the Chicago Police Department." (App. 26.)

On cross-motions for summary judgment, the district court reaffirmed its conclusion that petitioner had standing to seek declaratory relief for the class (App. 34-36) and concluded that the "hold past court call" policy was unlawful (App. 39-40):

> Paragraph C-2 permits the exact type of extended detention which the court in *Gerstein* [*v. Pugh* 420 U.S. 103 (1975)] found repugnant to Fourth Amendment rights. It specifically provides that an arrestee's detention be extended beyond the time when he would normally be sent before a magistrate so that police officers may continue the investigation. The reasoning behind this policy of extended detention is obvious: to build a case against a defendant while he is jail. However, the teaching of *Gerstein* in this regard is clear — hoping to build a case is not a permissible reason for jailing someone indefinitely. (citation omitted)

The day after the district court's decision, the Chicago Police Department rescinded the "hold past court-call" provision of General Order 78-1. (App. 5.)

The parties agreed to the amount of damages on petitioner's individual claim.[5] In its judgment order (App. 42-43), the district court granted class wide declaratory relief, stating that each member of the class had been "deprived by defendant City of Chicago of rights secured by the Fourth Amendment to the Constitution of the United States." (App. 43.)

On appeal, the Seventh Circuit reversed. Without reaching the constitutionality of the detention policy, the Court of Appeals held that under *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), petitioner's individual damage claim did not give petitioner standing to represent a class in seeking declaratory relief. (App. 15-18.) The appellate court acknowledged its disagreement on this issue with the Ninth Circuit. (App. 15.)

REASONS FOR GRANTING THE WRIT

The issues presented in this case are of substantial significance to the power of federal courts to provide remedies for violations of constitutional rights.

The question of whether a person with a live claim for individual damages may represent a class in seeking declaratory relief has, as the Seventh Circuit noted in its decision in this case (App. 15), divided the lower federal courts.

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5. Each plaintiff received five thousand dollars, exclusive of fees and costs. (App. 42.) The decision of the court of appeals is confusing in its reference (App. 4) to a monetary claim for $19.99. This was the amount of damages that petitioner had sought before the grant of summary judgment in order to avoid a jury trial.

The holding of the court of appeals that, although petitioner could sue for individual money damages, he lacks standing to secure declaratory relief for a class presents important questions that have not been but should be resolved by the Court about the reach of *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

I

Petitioner brought suit to challenge an explicit, written municipal policy that authorized warrantless investigative detentions of unlimited duration. Each detention authorized by the policy was usually too brief for the arrestee to secure counsel.[6] An arrestee who managed to secure counsel would not file suit to challenge the detention policy, but would instead seek release or an appearance before a judicial officer for the setting of bail.

The written policy was abandoned the day after the district court ruled that it was unconstitutional.[7] In addition to securing the end of the unconstitutional policy, petitioner obtained a declaration that he and the other persons who had been held because of the unlawful policy had been deprived of rights secured by the Fourth Amendment.

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6. Cf. *Kirby v. Illinois*, 406 U.S. 682 (1972) (no right to counsel at pre-indictment lineup).

7. The Court of Appeals correctly held (App. 5) that abandonment of the challenged policy after judgment did not moot the case. See *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982).

In the view of the Court of Appeals, petitioner lacked standing to secure a declaratory judgment for the class because he was not being detained under the detention policy when he filed suit. (App. 18.) The Seventh Circuit reasoned that because petitioner was not in custody when he filed suit, his claim for declaratory relief was "'dead on arrival.'" (App. 18, quoting *Holmes v. Fisher*, 854 F.2d 229, 232 (7th Cir. 1988).

As the Seventh Circuit acknowledged (App. 15), its holding is in direct conflict with the rule applied in the Ninth Circuit. In *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984), a woman who had been strip searched after an arrest for failure to pay parking tickets sought damages for the strip search, a declaratory judgment of the illegality of the strip search policy, and an injunction to prohibit continuation of the policy. The court held that because the plaintiff had standing to bring her damages action, she could seek declaratory and injunctive relief without having to show that she would again be arrested and strip searched. Id. at 619. Similarly, in *LaDuke v. Nelson*, 762 F.2d 1318, 1326 (9th Cir. 1985), *modified on other grounds*, 796 F.2d 309 (9th Cir. 1986), the Ninth Circuit held that standing to secure declaratory and injunctive relief "must focus on the standing of the *class* to seek equitable relief." 762 F.2d at 1325. On this standard, the standing question turns on whether "the plaintiff class faces a credible threat of recurring injury." Id. at 1326.

The Eleventh Circuit has itself produced conflicting decision on this question. In *McKinnon v. Talladega County*, 745 F.2d 1360 (11th Cir. 1984), the court held that a plaintiff with a live, individual damage claim presented "the requisite case-or-controversy" with respect to a request for injunctive relief on behalf of a class. Id. at 1364. In *Tucker v. Phyfer*,

819 F.2d 1070 (11th Cir. 1987), a divided panel refused to follow *McKinnon*, adopting the same rule applied by the Seventh Circuit in this case.

–II–

The conflict in the circuits is based on a disagreement about the reach of *Los Angeles v. Lyons*, 461 U.S. 95 (1983).

In *Los Angeles v. Lyons, supra*, a plaintiff who alleged that he had been stopped for a traffic violation and subjected to a chokehold had secured a preliminary injunction prohibiting the use of particular holds "under circumstances which do not threaten death or serious bodily injury." 461 at 100. The Court held that the plaintiff in *Lyons*, who was not representing a class, was unable to establish a personal stake in securing an injunction because he could not prove "either (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation or questioning or, (2) that the City ordered or authorized police officers to act in such manner." (emphasis in original) 461 U.S. at 105. As the Court explained in *Honig v. Doe*, 484 U.S. ___, 108 S.Ct 592 (1988), the plaintiff in *Lyons* "lacked standing to seek injunctive relief because he could not plausibly allege that police officer choked all persons whom they stopped, or that the City 'authorized police officers to act in such manner.'" Id. at 603.

Lyons did not arise from a written policy authorizing unconstitutional acts. In this case, however, petitioner established that the City had authorized its police officers in a written policy to make warrantless, investigative detentions of unlimited duration. (App. 37-41.)

In addition, *Lyons* did not consider the relationship between an individual damage claim and standing to secure declaratory relief. In *Lyons*, the parties had agreed that the "damages claim could be severed from [plaintiff's] effort to obtain equitable relief." 461 U.S. at 105 n.6. An individual damages claim satisfies the injury-in-fact required for jus tertii standing to assert the interests of others. *Caplin & Drysdale, Chartered v. United States*, ___ U.S. ___, 109 S.Ct. 2646, ____ n.3 (1989).

Finally, *Lyons* did not involve a case that met each of the requirements of Rule 23(a) of the Federal Rules of Civil Procedure and was proceeding as a class action under Rule 23(b)(2) to seek a declaratory judgment for the class that would have *res judicata* effect: the Court began its opinion with the statement that "[t]he issue here is whether respondent Lyons satisfied the prerequisites for seeking injunctive relief in the Federal District Court." 461 U.S. at 97.

III

The City's unconstitutional detention policy was applied until the day after the district court's decision on the merits and the class "always included some [arrestees] with live claims." *Singleton v. Wulff*, 428 U.S. 106, 117 (1976). Detention under the City's policy was temporary and, as in *Gerstein v. Pugh*, 420 U.S. 103 (1975), "the constant existence of a class of persons suffering the deprivation [was] certain," id. at 110 n.11, because "new persons with 'live' claims . . . [were] constantly entering the category of those currently subject to defendants' alleged practice." *Lewis v. Tully*, 99 F.R.D. 632, 644 (N.D.Ill. 1983).

When the district court permitted the case to proceed as a class action "the class of unnamed persons described in the

certification acquired a legal status separate from the interest asserted by [the original plaintiff]." *Sosna v. Iowa*, 419 U.S. 393, 399 (1975). Thus, as the Ninth Circuit concluded in *LaDuke v. Nelson*, 762 F.2d 1318, 1326 (9th Cir. 1985), *modified on other grounds*, 796 F.2d 309 (9th Cir. 1986), and as the district court concluded in this case (App. 36), standing to secure declaratory relief should turn on the existence of a live dispute between the City and "the unnamed class members with respect to the underlying cause of action." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 756 (1976).

In the view of the Seventh Circuit, however, *Lyons* requires that a party seeking an injunction must either be subject to the challenged policy when filing suit or must be able to show a likelihood of again being subject to the policy. (App. 15-18.) This mechanical application of the "same plaintiff" test to the "capable of repetition yet evading review" doctrine is contrary to the reasoning applied by this Court in *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976) and *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), and ignores principles of jus tertii standing.

The Court has frequently applied the "capable of repetition yet evading review" test to cases involving short-lived claims. See, e.g., *Sosna v. Iowa*, 419 U.S. 393, 403 (1975) *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975). This doctrine, when applied to non-class actions, usually requires a "'reasonable expectation' that the same complaining party would be subjected to the same action again." *Lane v. Williams*, 455 U.S. 624, 634 (1982).

As Mr. Justice Scalia observed in his dissenting opinion in *Honig v. Doe*, 484 U.S.___, 108 S.Ct. 592, 610-11 (1988), the "same plaintiff" test has not been applied in two abortion cases, *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973), and several election law decisions, *Rosario v. Rockefeller*, 410 U.S. 752 (1973) and *Dunn v. Blumstein*, 405 U.S. 330 (1972).

As applied to a properly certified class action, the "same plaintiff" test should not be applicable when, as in *Gerstein*, "the constant existence of a class of persons suffering the deprivation is certain." 420 U.S. at 110 n.11 (1975). When, as here, a challenged policy is being applied when suit is filed and the policy continues to effect unnamed members of the class until the day after entry of judgment, the class representatives should not be required to show an individual risk of future harm to secure declaratory relief. Injury to the class is enough to present "a 'live controversy' reflecting the issues before the Court." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 757 (1976).

The Court endorsed the injury to the class theory in *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980). There, in holding that a plaintiff whose individual claim had become moot had standing to seek to represent the putative class on an appeal from an order denying class certification, the Court recognized that "[a] plaintiff who brings a class action presents two separate issues for judicial resolution. One is the claim on the merits; the other is the claim that he is entitled to represent the class." Id. at 402.

The Court's willingness to permit a class representative to assert the rights of unnamed members of the class is a straightforward application of jus tertii standing. The class

representative, as a person who has suffered some injury from the challenged policy, *East Texas Motor Freight v. Rodriquez*, 431 U.S. 395 (1977), satisfies Article III's case-or-controversy requirement, thereby meeting the first test for jus tertii standing. *Caplin & Drysdale, Chartered v. United States*, ___ U.S. ___, 109 S.Ct. 2646, 2651 n.3 (1989). The second test for jus tertii standing — "do prudential considerations . . . point to permitting the litigant to advance the claim" — involves an evaluation of "the relationship of the litigant to the person whose rights are being asserted; the ability of the person to advance his own right; and the impact of the litigation on third party interests." Id.

As a class representative, petitioner is entitled to assert the rights of unnamed members of the class. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 755 (1976). Although each class member could file an individual damages action, the amount at stake in any single investigative detention may be too small to justify the time and expense required to establish the illegality of the policy. Finally, the litigation furthers the interests of the class by conclusively establishing the illegality of the policy and resulting in a declaratory judgment that would have *res judicata* effect and serve "as a predicate to a damages award." *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974).

—IV—

The decision of the Seventh Circuit to equate prospective injunctive relief with declaratory relief (App. 16) is contrary to the rule applied by this Court in *Zwickler v. Koota*, 389 U.S. 241 (1967) that "a federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction." Id. at 254. "[D]ifferent

considerations" apply to requests for declaratory and requests for injunctive relief. *Steffel v. Thompson*, 415 U.S. 452, 469 (1974). As the Court made plain in *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974), a party not entitled to an injunction "may still retain sufficient interests and injury as to justify the award of declaratory relief." Id. at 122.

In order to obtain an injunction, a litigant must show a reasonable possibility of future harm. *Honig v. Doe*, 484 U.S. ___, 108 S.Ct 592 (1988). This standard should not be applicable to a declaratory judgment that is intended to serve as the basis for damage awards in individual cases to be filed by members of the class.

A judgment in a Rule 23(b)(2) class action "will bind all persons who have been found at the time of certification to be members of the class." *Sosna v. Iowa*, 419 U.S. 393, 399 n.7 (1975); *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984). Petitioner used the declaratory judgment to secure a monetary settlement from the City; but for the decision of the court of appeals, members of the plaintiff class would likewise have been able to use the *res judicata* effect of the declaratory judgment "as a predicate to a damages award." *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974).

The judgment was afforded *res judicata* effect in *Muhammed v. City of Chicago*, N.D.Ill. No. 84 C 4514. There, after the plaintiff had been arrested for a misdemeanor, Chicago police officers invoked the "hold past court call" policy while they investigated the suspect's involvement in two sexual assaults. (App. 46-47.) After investigating for four days, the officers abandoned their efforts and permitted Muhammed to appear before a judge,

who released Muhammed on his own recognizance on the original misdemeanor charge. (App. 47.) The district court in *Muhammed* relied on the decree in this case to conclude that "because the city held plaintiff pursuant to the authority of Paragraph C-2, it, by its own admission, delayed his appearance before a judicial officer for a time, in the words of Paragraph C-2, 'longer than that which might routinely be expected.' In order words, when Paragraph C-2 is invoked, an unconstitutionally extended detention takes place."[8] (App. 49-50.)

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

August, 1989

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8. *Muhammed* is now before the district court on defendant's motion to vacate the grant of summary judgment in light of the decision of the court of appeals in this case.

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 87-1146

ALBERT ROBINSON, WILLIE MOORE, and JOHN RICHARDSON, individually and on behalf of a class,

Plaintiffs-Appellees,

v.

CITY OF CHICAGO, an Illinois municipal corporation,

Defendant-Appellant.

No. 87-1778

WILLIAM DOULIN and BENJAMIN PERLMAN, individually and on behalf of a class,

Plaintiffs-Appellees,

v.

CITY OF CHICAGO,

Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 83 C 5685—**George N. Leighton**, *Judge.*
No. 82 C 6771—**Ilana Diamond Rovner**, *Judge.*

ARGUED NOVEMBER 12, 1987—DECIDED FEBRUARY 21, 1989

Before BAUER, *Chief Judge*, RIPPLE, and MANION, *Circuit Judges.*

MANION, *Circuit Judge.* Defendant City of Chicago appeals from a judgment in No. 87-1146 declaring unconstitutional its policy permitting investigative detentions and a judgment in No. 87-1778 declaring unconstitutional its policy of detaining misdemeanor arrestees until their fingerprints

cleared. Because no named plaintiff in either action had standing to sue, we reverse both judgments. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660 (1983).

I. NATURE OF THE CASE IN NO. 87-1146 (Robinson)

On July 18, 1981, at 5:30 in the morning, a deliberately set fire destroyed an apartment building in Chicago. Four tenants died. Immediately, police detectives interviewed various witnesses. One tenant informed the investigators that plaintiff John Richardson, a former tenant, had been fighting with his girlfriend, Cecilia Saunders, also a tenant. This tenant added that he had learned from another that Richardson had been in the building at about 4:00 that morning. This other person told the detectives that he had seen Richardson in the building in the pre-dawn hours that morning. Another tenant related that Richardson had warned her to leave the building because he was going to "torch" it. Later, one David Pruitt informed the detectives that Richardson had asked him the night before the fire to lure girlfriend Saunders outside the building so that Richardson could shoot her. Based upon this evidence, Chicago police officers arrested Richardson without a warrant at approximately 2:10 p.m. on the day of the fire. *Robinson v. City of Chicago*, 638 F.Supp. 186, 188 (N.D. Ill. 1986).

At 6:00 p.m., Whalen and Mannion, two Chicago police detectives, interviewed Richardson for approximately two hours. Richardson proffered as an alibi that he had been with plaintiffs Willie Moore and Albert Robinson throughout the previous night and into the morning. When interviewed by the detectives, Moore and Robinson corroborated Richardson's alibi. Later that night, however, Pruitt repeated to detectives Whalen and Mannion his account that Richardson had asked him the night before the fire to lure his girlfriend outside so that Richardson could shoot her. Faced with this conflict between Richardson's alibi and Pruitt's compelling version, the detectives filled out a form requesting that Richardson be "held over" past

the next court call so that the detectives could continue to investigate. The watch commander in the detention facility approved this request.

The police held Richardson pursuant to a policy set out in General Order 78-1 of the Chicago Police Department. Section 6, paragraph C-2 of the General Order authorized police officers to detain arrestees when "there is a necessity for the detention . . . for a period of time longer than that which might be routinely expected, in order that they may continue the investigation." This General Order was known as the City's "hold past court call" policy. During a Rule 30(b)(6) deposition, the City's selected representative stated that the policy's purpose was to permit "detective division personnel . . . more time to complete their investigation."

The police held Richardson for three days while they continued to investigate, without presenting Richardson to a neutral magistrate. During these three days, the evidence implicating Richardson mounted. Fire department investigators found a charred plastic bottle which contained the accelerant used to start the fire. The investigators then traced the bottle to Richardson. The investigators also learned that Richardson had told his girlfriend that he would burn the building down by pouring gasoline from the second floor down to the first. The fire department's investigation had earlier discovered this was just how the fire started. A gas station attendant picked Richardson out of a lineup as the purchaser of a can of gasoline the night before the fire. On July 20, the police assembled all the witnesses so that an Assistant State's Attorney could interview them. Each of the witnesses repeated their incriminating accounts. In addition, Pruitt's wife reported that Richardson had also asked her to lure his girlfriend outside the building, while still another witness reported that Richardson had also told her several days before the fire that he would burn down the building. Even Richardson's alibi witnesses changed their account and stated that they were not sure that Richardson was with them at the time the fire started.

Finally, on July 21, a grand jury charged Richardson with murder of the four tenants. That evidence notwithstanding, a jury acquitted Richardson.

On August 22, 1983, Richardson and his two alibi witnesses, Robinson and Moore, sued the City and detectives Mannion and Whalen pursuant to 42 U.S.C. § 1983. In plaintiffs' second amended complaint, filed on March 1, 1985, plaintiffs Robinson and Moore sued the detectives, seeking compensatory and punitive damages for their detaining them without probable cause in order to investigate Richardson's alibi. Subsequently, Robinson and Moore settled their claims. Their claims are not at issue in this appeal.

Plaintiff Richardson sued the City both individually and on behalf of a class. Richardson alleged that he was "held in custody for more than two days" pursuant to the General Order and that the General Order violated the Fourth Amendment by authorizing investigative detentions. Richardson sought—for himself and for the class—a declaratory judgment "as to the illegality of the City's investigative detention policy." Richardson also sought compensatory damages of $19.99. Richardson and the City, however, soon settled his damages claim; that claim is not at issue in this appeal either.

Richardson's proposed class for declaratory relief consisted of "[a]ll persons who, from August 17, 1978 to the time of entry of judgment were held in custody without the filing of charges pursuant to Section 6, Paragraph C-2 of General Order 78-1 . . . ." Richardson argued that the "hold past court call" policy deprived each member of the class of rights secured by the Fourth Amendment because it authorized extended detention without a judicial determination of probable cause.

The City moved to dismiss Richardson's complaint on the grounds that he failed to state a claim upon which relief could be granted and that he lacked standing to sue for declaratory relief. After the court denied the City's motion, Richardson moved to certify the proposed class. On February 21, 1986, the court granted Richardson's mo-

tion and held that this action could be maintained as a class action pursuant to Fed.R.Civ.P. 23(b)(2) on behalf of "[a]ll persons who from August 17, 1978 to the time of entry of judgment were held in custody without the filing of charges" pursuant to the General Order.

Richardson and the City subsequently filed cross-motions for summary judgment on the prayer for declaratory relief. On June 25, 1986, in a reported opinion, the court denied the City's motion and granted Richardson's cross-motion, concluding that the "hold past court call policy" was unconstitutional:

> Paragraph C-2 permits the exact type of extended detention which the Court in *Gerstein* [*v. Pugh*, 420 U.S. 103 (1975)] found repugnant to Fourth Amendment rights. It specifically provides that an arrestee's detention be extended beyond the time when he would normally be sent before a magistrate so that police officers may continue the investigation. The reasoning behind this policy of extended detention is obvious; to build a case against a defendant while he is in jail. However, the teaching of *Gerstein* . . . is clear—hoping to build a case is not a permissible reason for jailing someone indefinitely.

638 F.Supp. at 192.

The next day, the police department issued a teletype order rescinding the "hold past court call" policy. The City subsequently moved to dismiss the action on the grounds that it had been rendered moot by this policy change. The court denied that motion.

By the time the court entered judgment on December 23, 1986, the damages claims of the three named plaintiffs had already been settled. Thus, what remained was for the district court to enter a declaratory judgment on behalf of the class: the court declared that each class member had been "deprived by defendant City of Chicago of rights secured by the Fourth Amendment to the

Constitution of the United States."[1] The City timely appeals.[2]

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[1] After issuing its memorandum, the district court entered a corresponding judgment order prepared and lodged by Richardson's counsel. This order contained a final paragraph entitled "Reservation of Jurisdiction" in which "the Court expressly reserves jurisdiction to enter such further orders as may be required to effectuate the judgment . . . ." Yet plaintiff did not seek injunctive relief, and could not do so by first placing in the judgment order that he lodged some language about "further orders." The judgment order also "defers until final adjudication of the City's appeal the question of whether notice of any sort is appropriate." It appears that Robinson's counsel, having chosen to seek only declaratory relief under Fed.R.Civ.P. 23(b)(2) to avoid notifying each member of the class, as otherwise would have been required by Fed.R.Civ.P. 23(c)(2), was by carefully crafting the judgment order seeking to protect options that he purposefully gave up earlier. If that were the court's final order, nonetheless, this court would not have jurisdiction to hear this appeal. *See American Interinsurance v. Occidental Fire & Cas.*, 835 F.2d 157, 159 (7th Cir. 1987).

Fortunately, in light of the time that has elapsed in the course of this lawsuit over a practice that the City long ago abandoned, the final document in the district court, entitled "judgment in a civil case" and entered by the Clerk, does not include any of Robinson's precatory language about reserving jurisdiction. We presume that the district court, as required by Fed.R.Civ.P. 58(2), approved of the form of the judgment entered by the Clerk. *See American Interinsurance, supra*, 835 F.2d at 160. Thus, the last word from the district court does not contemplate doing anything further and this court has appellate jurisdiction. We only note how ironic it is that the parties wrote pages on the significance of the City's Corporation Counsel's failure to personally sign his own name on the notice of appeal, yet they, along with the district court, did not appreciate, much less discuss, any potential jurisdictional problems with the way that the parties left the case in the district court.

[2] To file timely a notice of appeal is "mandatory and jurisdictional." *United States v. Robinson*, 361 U.S. 220, 229 (1960). The City's notice of appeal concludes with the name of the Corporation Counsel, Judson Miner, typed below the signature line. Mr. Miner, however, did not sign the notice of appeal. Rather, someone

(Footnote continued on following page)

[2] *continued*

in the Corporation Counsel's office signed the notice of appeal in Mr. Miner's name and placed his initials next to Mr. Miner's supposed signature. As a result, plaintiff argues, this court lacks jurisdiction over the appeal because the notice of appeal was not signed by an attorney "in the attorney's individual name," as required by Fed.R.Civ.P. 11.

We reject plaintiff's contention. Fed.R.Civ.P. 11 requires that "every pleading . . . and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name" and this rule applies to notices of appeal. *Thornton v. Wahl*, 787 F.2d 1151, 1153 (7th Cir.), *cert. denied*, 479 U.S. 851 (1986). The City, however, has satisfied both the letter and purpose of Rule 11. Rule 11 reminds an attorney that he is accountable for every pleading he submits on behalf of his client. *See Lewis v. Lenc-Smith Mfg. Co.*, 784 F.2d 829, 830 (7th Cir. 1986) (per curiam). Inadequate representation can cost a client important rights; the attorney's signature highlights who is personally responsible.

The Municipal Code of the City of Chicago, Ch. 6, § 6-2(b), makes the Corporation Counsel legally accountable for all matters filed on the City's behalf. As a corollary, anything signed by an authorized agent of his is as if he himself signed it within the meaning of Rule 11. Thus, this is unlike a case submitted by one unrepresented party for another, *see, e.g., Bach v. Coughlan*, 508 F.2d 303, 306 (7th Cir. 1974); *Lewis, supra*, 784 F.2d at 830-31; *Church v. Commissioner*, 810 F.2d 19, 20 (2d Cir. 1987), or where the pleadings contain no signature, *see, e.g., United States ex rel Sacks v. Philadelphia Health Management Corp.*, 519 F.Supp. 818, 826 n.9 (E.D. Pa. 1981), or just the name of a large firm without a particular individual, *see, e.g., Stewart v. City of Chicago*, 622 F.Supp. 35, 38 (N.D. Ill. 1985).

In any event, an unsigned notice of appeal, even if it does not meet the demands of Fed.R.Civ.P. 11, meets the jurisdictional requirements for appeal. *See, e.g., McNeil v. Blackburn*, 802 F.2d 830, 832 (5th Cir. 1986) (per curiam); *Lewis, supra*, 784 F.2d at 831; *see also Thiem v. Hertz Corp.*, 732 F.2d 1559, 1562 (11th Cir. 1984). Plaintiff points to Fed.R.App.P. 3(c), which provides that "the notice of appeal shall specify the party or parties taking the appeal." Failure to name a party is jurisdictional and requires dismissing the appeal. *See Torres v. Oakland Scavenger Co.*, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988). But naming a party is a specified appellate requirement; a signed notice is not. Thus, while we

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II. NATURE OF THE CASE IN NO. 87-1778 (Doulin)

The appeal in No. 87-1778 also presents a challenge to another facet of the City's policy of detaining arrestees. The nature of the case and nature of the proceedings are fully set forth in the district court's opinion reported below as 662 F. Supp. 318. We set forth only those facts necessary to decide the one issue facing this court on appeal.

William Doulin works at and Benjamin Perlman owns a retail jewelry store in Chicago. On October 9, 1981, Chicago police officers arrested Perlman and Doulin for the misdemeanor offense of receipt of stolen jewelry. 662 F. Supp. at 321.

The Chicago Police Department maintains a criminal history or "rap sheet" to which an individual record number ("IR number") is assigned for every individual who is arrested. Each arrestee is identified by his or her fingerprints and is assigned an IR number. After a name check against the rap sheet, all arrestees are fingerprinted because the result of a name check is considered to be tentative; arrestees frequently offer alias identities, give false information regarding the date of their birth, or otherwise lie about who they are. Evidence introduced by the police department at trial showed that over fifty percent of arrestees will lie about their identity if they are arrested for another crime while on probation or parole or while indicted.

Under the same General Order 78-1 at issue in *Robinson*, the Chicago Police Department would detain misdemeanor arrestees while the fingerprints were transported

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[2] *continued*
emphasize that a notice of appeal must be signed, there is nothing in the *Torres* decision, or in our cases applying *Torres*, such as *Allen Archery, Inc. v. Precision Shooting Equipment, Inc.*, 857 F.2d 1176, 1177 (7th Cir. 1988) (per curiam), which suggests that we should dismiss this appeal.

to the Department's Identification Section located at headquarters at 1121 South State Street, where they were analyzed and compared to previous criminal records of an arrestee if such records (or outstanding arrest warrants) existed. The prints were transported either by facsimile machine or by police department mail. Fingerprints transported by police department mail were delivered to the Identification Section three times during each eight-hour watch.

At headquarters, the fingerprints were analyzed to ascertain the true identity and criminal record of each arrestee and to determine the existence of any outstanding arrest warrants. Up to and including the time of trial, police department technicians would check fingerprints manually according to the so-called "Henry classification" system and then compare the fingerprints to those filed under the IR number.[3] If the fingerprints matched, the new arrest would be added to the arrestee's rap sheet. If the technicians were unable to match the arrestee's fingerprints with those on file, a new IR number would be assigned to the arrestee. After the updated rap sheet was transmitted to the detention center where an arrestee was being held, the arrestee was considered to have "cleared" fingerprinting.

The Department believed that these fingerprint checks were the only means of positively identifying the arrestee. In addition, a fingerprint check could also reveal prior criminal convictions, prior arrests, prior use of aliases, and prior bond forfeitures, which under Illinois statute are all factors relevant to the setting of a bond or other conditions for pretrial release. Ill. Rev. Stat. ch. 38, § 110-5 (1985). Thus, the Department would wait for fingerprints to clear before allowing a misdemeanor arrestee to post a cash bond at the station or alternatively taking the ar-

[3] Since January, 1987, fingerprints have been analyzed under the Automated Fingerprint Identification System (AFIS). This system can accurately match up to one thousand fingerprints in a minute.

restee before a judge[4] for a probable cause hearing and bond determination. The district court found that—as of the trial in 1986—the average time for "fingerprint clearing" was four to six hours and that ten percent of all misdemeanor arrestees were held for longer than ten hours while their prints cleared.

Even though Doulin and Perlman were known to the officers, and even though Illinois law provides that a misdemeanor arrestee is to be released on bail upon posting a $100 cash bond, 662 F. Supp. at 321, which Doulin and Perlman each had, both were locked in a cell to await fingerprint clearing, one for six hours and the other for twelve.

On November 3, 1982, Doulin and Perlman filed the original complaint in this case on behalf of themselves and a class of those similarly situated defined as those arrested since 1977 on misdemeanor charges by Chicago police officers and detained pursuant to the City's fingerprint clearing policy. The plaintiffs originally sought injunctive relief and damages on the grounds that this policy, as applied to misdemeanor arrestees, violated the Fourth Amendment's prohibition against unreasonable seizures. They sought a permanent injunction directing the City to abandon the policy. Subsequently, plaintiffs amended the complaint to add on two more named plaintiffs, Vanessa Taylor and Patricia Muhamad, and to also seek declaratory relief.

On July 9, 1984, the court granted the City's motion to dismiss the individual claims for injunctive relief:

> The individual plaintiffs have failed . . . to allege that they will again be arrested, charged with a misde-

[4] Until May 4, 1985, all misdemeanor arrestees were detained until their fingerprints cleared. On May 4, 1985, the police department adopted a new General Order requiring that the watch commander waive fingerprint clearance for misdemeanor arrestees who have sufficient personal identification and who check clear on a name check at the station, unless they are charged with an offense which may be raised to a felony.

> meanor and illegally detained. It may be that some of the plaintiffs are quite likely to again be arrested. For example, Doulin and Perlman may face a particular risk of rearrest if the police are engaged in a concerted effort to ferret out jewelers who buy stolen jewelry. Plaintiffs have not attempted to factually distinguish *Lyons* in this manner; consequently, the individual claims for injunctive relief must be dismissed.

Memorandum and Order of July 9, 1984, at 5-6. Nonetheless, the court held while the individual plaintiffs did not allege a case or controversy which would justify injunctive relief, the class did. Order of July 9, 1984 at 6. The court then certified a class pursuant to Fed.R.Civ.P. 23(b)(2) consisting of:

> All persons who were arrested on other than a felony charge by a police officer of the City of Chicago on or after November 3, 1977, and who were detained pursuant to the "fingerprint clearing" policy of the City of Chicago . . . .

Order of July 9, 1984 at 9. See 662 F. Supp. at 320.

After putting aside the damages claim until later, the district court held a trial lasting seven days on the issue of the City's liability for declaratory and injunctive relief. On August 26, 1986, the district court issued the reported memorandum opinion holding that the fingerprint clearing policy "as presently constituted is unconstitutional," 662 F.Supp. at 335, because it "infringes upon the rights of misdemeanor arrestees to be released immediately upon posting of bail or to a prompt presentation to a judge or magistrate for a probable cause hearing." 662 F.Supp. at 334. The court found that "one of the principal purposes behind the fingerprint clearing policy—i.e., to identify persons sought in outstanding arrest warrants or stop orders who give false names upon arrest—is unsupported by any statistical evidence," *id.* at 326, and that the "evidence demonstrates that the City of Chicago has turned lengthy post-arrest detentions of misdemeanor arrestees, ostensibly for the purpose of clearing their fingerprints, into

the penalty or punishment itself for misdemeanor crimes upon which these arrestees have not been convicted . . ." *Id.* at 327. The court permanently enjoined the City from detaining misdemeanor arrestees to wait for their fingerprints to clear unless there exists a "quantum of individualized suspicion" that an arrestee is wanted for other crimes.

Subsequently, on April 20, 1987, the court entered final judgment on behalf of the plaintiff class defined as "[a]ll persons who were arrested on other than a felony charge by a police officer of the City of Chicago on or after November 3, 1977, who had no reasonable probability of having charges against them elevated to a felony charge, and who were detained pursuant to the 'fingerprint clearing' policy of the City of Chicago implemented in police department General Order 78-1." *Id.* at 328. The court enjoined the City from detaining misdemeanor arrestees for fingerprint clearance "where there is no reasonable possibility of having such charges elevated to felony, unless, on the basis of objective factors, there is a reasonable suspicion that the person is not whom he (or she) claims to be or that such person is wanted for other crimes. This discretion shall not extend to persons who voluntarily surrender to answer a misdemeanor warrant." *Id.* at 337. The court further directed the City to issue a new policy within sixty days and to report to plaintiffs' counsel on all persons detained for fingerprint clearance until the policy goes into effect. The court then certified under Fed.R.Civ.P. 54(d) that there was no reason to delay entry of judgment and directed the clerk to enter final judgment for plaintiffs on their claims for declaratory and injunctive relief.

The City timely appealed. After oral argument, on November 13, 1987, this court issued an order staying the district court's judgment until issuance of this opinion.

III. ANALYSIS

Both cases present one question. Not surprisingly, the plaintiffs in both cases were well represented by the same counsel, and the district court in *Doulin* cited with approval the *Robinson* opinion. We resolve this matter by holding that each named plaintiff did not and does not have standing to seek equitable relief either on his own behalf or that of the plaintiff class. The principles that govern the declaratory and injunctive claims of the *Doulin* plaintiffs apply to Richardson's standing to interpose his declaratory claim. Since the argument is the same, we will analyze the law primarily as to Richardson's facts and then apply that analysis to the *Doulin* plaintiffs as well.

This matter is controlled by *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). In *Lyons*, the plaintiff sued the City of Los Angeles and several of its police officers, alleging that the officers, without provocation, applied a chokehold when they stopped him for a traffic violation. The plaintiff sought damages and an injunction barring chokeholds except where a suspect threatens to use deadly force. The Supreme Court in *Lyons* held that there was no federal jurisdiction over the plaintiff's claim for injunctive relief.

The Court in *Lyons* reasoned that to invoke Article III jurisdiction, a plaintiff seeking injunctive relief must show that he is in immediate danger of sustaining some direct injury. Relying upon *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974), the Court stated that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." The Court found that while the plaintiff may have had standing to seek damages against the individual officers and even the City, he could not establish a real threat that an officer would choke him again:

> [T]o establish an actual controversy . . . Lyons would have had not only to allege that he would have another encounter with the police but also to make the

> incredible assertion either (1) that all police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter . . . or (2) that the City ordered or authorized police officers to act in such manner.

Lyons, 461 U.S. at 105-106 (emphasis in original).

In his case, Richardson does allege that the City had a written policy authorizing officers to detain persons for investigation and the *Doulin* plaintiffs similarly allege that the City had a written policy to detain to await fingerprint clearance. *Cf. E.Z. v. Coler*, 603 F.Supp. 1546, 1551 n.6 (N.D. Ill. 1985), *aff'd* 801 F.2d 983 (7th Cir. 1986). Yet, as with the *Lyons* plaintiff, neither Richardson nor the *Doulin* plaintiffs can allege that it is reasonably likely that they will again encounter the police. *See Palmer v. City of Chicago*, 755 F.2d 560, 572 n.9 (7th Cir. 1985). Because the various plaintiffs' future conduct presumably will give the police no probable cause to arrest them, they cannot expect that they will encounter the police or, if they did, that the police would again detain them pending investigation or fingerprint clearance. Thus, even if the police were to continue to detain others for investigation (at oral argument we were told they no longer do so), the possibility that Richardson would suffer any injury as a result of that practice is too speculative. Richardson has not alleged and has not shown that he is in immediate danger of again being directly injured by the same official conduct challenged as unconstitutional—post-arrest detention for investigation prior to a probable cause hearing. As the district court correctly found, "here, there is no reasonable likelihood that named plaintiff's expired claims will recur." 638 F.Supp. at 190. And as mentioned above, the court in *Doulin* has already found that "[t]he individual plaintiffs have failed . . . to allege that they will again be arrested, charged with a misdemeanor and illegally detained." Under *Lyons*, therefore, the court was required to dismiss Richardson's and the *Doulin* plaintiffs' claims for equitable

relief for lack of standing.[5] *See Gladden v. Roach*, slip op. No. 87-6173 (5th Cir. Feb. 8, 1989), available on WESTLAW as 1989 WL 3534.

The Ninth Circuit has adopted a rule that where a plaintiff's claims for damages and declaratory relief are predicated on a single legal theory requiring development of the same facts, and a live controversy exists between the plaintiff and defendant for a damages claim, then federal jurisdiction exists over the declaratory relief claim as well. *See Smith v. City of Fontana*, 818 F.2d 1411, 1422-23 (9th Cir.), *cert. denied*, 108 S.Ct. 311 (1987). In *Smith*, the Ninth Circuit distinguished *Lyons* on the grounds that there the district court had severed the damages claim from the injunctive claim, so that the Supreme Court was considering the injunctive claim alone:

> *Lyons* and its progeny do not preclude the exercise of federal jurisdiction when a plaintiff brings both a claim for damages and a related claim for equitable relief in the same lawsuit.
>
> * * *
>
> [Where a plaintiff] had to establish all of the facts necessary to support her claim for equitable relief in order to win her damages claim, . . . she "demonstrate[d] a 'personal stake in the outcome' " of her claim for equitable relief sufficient to " 'assure that concrete adverseness' necessary for the proper resolution of constitutional questions." *Lyons*, 461 U.S. at 101, 103 S.Ct. at 1665 (citations omitted).

818 F.2d at 1422.

We read *Lyons* differently. In *Lyons*, the Court carefully distinguished between the floating damages claim, for which standing existed, and the injunctive claim, for which

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[5] While the *Lyons* plaintiff sought injunctive relief, the same standard and reasoning applies to a plaintiff's claim for declaratory relief. *See, e.g., Smith v. City of Fontana*, 818 F.2d 1411, 1421 n.17 (9th Cir.), *cert. denied*, 108 S.Ct. 311 (1987). The declaratory relief statute is not an independent basis of jurisdiction and requires an "actual controversy."

it did not. The D.C. Circuit correctly summarized *Lyons* when it read *Lyons* as holding that "although damage standing available, injunctive standing not." *Nat. Maritime Union v. Commander, MSC*, 824 F.2d 1228, 1234 (D.C. Cir. 1987). In addition to faithfully interpreting *Lyons*, this also presents the better rule. The plaintiffs cannot show irreparable injury precisely because they cannot show a real or immediate threat that they will be wronged again, while any previous injury can be and was compensated for by damages. In this regard, the Court noted that the proper balance between state and federal spheres of authority cautions against enjoining state officers administering a state's criminal laws where there is no irreparable injury. *Lyons*, 461 U.S. at 112-113.

Trying to save his equitable claim, Richardson contends that his quest for declaratory relief properly falls within federal jurisdiction because temporary investigative detentions are "capable of repetition yet evading review." The "capable of repetition, yet evading review" doctrine applies where a claim is so transitory that a plaintiff may have standing when litigation begins but loses it—loses his personal stake—as the litigation continues. This doctrine, however, "applies . . . only when repetition is likely to embroil the same parties to the dispute." *Holmes v. Fisher*, 854 F.2d 229, 232 (7th Cir. 1988). Because the plaintiff faces a reasonable likelihood of being in the same situation again, "vigorous advocacy can be expected to continue." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 398 (1980). The capable-of-repetition doctrine does not apply except in those exceptional situations where a plaintiff can reasonably show that he will again be subject to the alleged illegality. *Lyons*, 461 U.S. at 110; *see also Tucker v. Phyfer*, 819 F.2d 1030, 1034 n.4 & 1035 (11th Cir. 1987).

Richardson in response contends that the class has standing: as the class consisted of all in custody pursuant to the General Order up to the date of judgment, someone in the class had to have had standing at the time the complaint was filed as well as at the time the class was cer-

tified. Without any evidence, Richardson claims that several hundred unnamed members of the class were subject to detention in the five years prior to the entry of judgment. Thus, Richardson argues, "the constant existence of a class of persons suffering from the deprivation is certain." *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975), and "new persons with 'live' claims for injunctive relief . . . are constantly entering the category of those currently subject to defendants' alleged practice." *Lewis v. Tully*, 99 F.R.D. 632, 644 (N.D. Ill. 1983), *disagreed with by Boston v. City of Chicago*, No. 86-C-5534 (N.D. Ill. Mar. 28, 1988), found in WESTLAW as 1988 WL 31532; *Williams v. City of Chicago*, 609 F.Supp. 1017 (N.D. Ill. 1985).

If Richardson's position were correct, the *Lyons* plaintiff could have acquired standing simply by pleading his claim as a class action. Instead, *Lyons* relied upon *O'Shea*, *supra*, 414 U.S. at 494, where the Court held that a class does not become a separate entity until it is certified and, in turn, that a class will not be certified unless the named plaintiff has standing at that time.

In *Gerstein*, *supra*, two Florida pretrial detainees arrested under a prosecutor's information filed a class action seeking a declaration and injunction that they were entitled to a judicial determination of probable cause. The record did not indicate whether the named plaintiffs were still detained at the time the district court certified the class, and they had been convicted by the time of oral argument before the Supreme Court. 420 U.S. at 110 n.11. Because it was "by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class," the Court in *Gerstein* allowed an exception to the rule that mootness of a class representative's claim moots the class claims. 420 U.S. at 110 n.11. But a representative's claim must at least be live when he files the case, even if the representative's case becomes moot before the class is certified. *See Geraghty*, 445 U.S. at 403-04 ("an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim

. . . ."); *Holmes*, *supra*, 854 F.2d at 232. In contrast, Richardson never had a stake in the declaratory relief to lose; "[t]his case was dead on arrival, moot the day the complaint was filed. So far as equitable relief was concerned, there was *never* a case or controversy within the meaning of Art. III of the Constitution. *Geraghty* does not breathe life into a stillborn case." *Holmes*, *supra*, 854 F.2d at 232; *see Foster v. Center Township*, 798 F.2d 237, 245 (7th Cir. 1986). "To permit the certification of a class headed by a 'representative' who did not have a live controversy with the defendant on the day the suit began would be to jettison the last vestiges of the case-or-controversy requirement in class actions." *Holmes*, *supra*, 854 F.2d at 233.

We recognize that the pragmatics of the situation in which Richardson and the *Doulin* plaintiffs found themselves suggest no significant possibility that a putative plaintiff would have enough time while detained to file suit; the challenged governmental conduct is limited temporally. Our holding, however, does not mean that there is and would have been no way to challenge the "hold past court call" policy: any findings the court made in awarding damages could have precluded the City from relitigating the merits of its policy. Robinson could have achieved the same result as reached here by suing the City for damages; the court's holding that the General Order was unconstitutional would have served as *res judicata* in any subsequent action. Robinson most likely chose not to pursue classwide damages to avoid the attendant notice requirements, but "[t]here is no need to throw away a venerable constitutional rule just to retain a replaceable champion." *Holmes*, *supra*, 854 F.2d at 233. The *Doulin* plaintiffs, in comparison, still retain a pending damages claim.

IV. CONCLUSION

The district court in No. 87-1146 (Robinson) should have dismissed Richardson's claim for declaratory relief as soon as it was filed. The district court in No. 87-1778 (Doulin)

should have similarly dismissed the claims of plaintiffs there for declaratory and injunctive relief. As noted, however, a properly filed damages claim remains pending, and we do not see any reason why the district court could not rely in full on its previous findings of fact.

The district court's judgments in Nos. 87-1146 and 87-1778 are

REVERSED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 87-1146

ALBERT ROBINSON, WILLIE MOORE, and
JOHN RICHARDSON,
individually and on behalf of a class

Plaintiffs-Appellees,

v.

CITY OF CHICAGO,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 83 C 5685—**George N. Leighton,** *Judge.*

[February 21, 1989]

JUDGMENT — ORAL ARGUMENT

HON. WILLIAM J. BAUER, Chief Judge
HON. KENNETH F. RIPPLE, Circuit Judge
HON. DANIEL A. MANION, Circuit Judge

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby REVERSED, with costs, in accordance with the opinion of this Court filed this date.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 87-1146

ALBERT ROBINSON, WILLIE MOORE, and
JOHN RICHARDSON,
individually and on behalf of a class

Plaintiffs-Appellees,

v.

CITY OF CHICAGO,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 83 C 5685—**George N. Leighton,** *Judge.*

[May 12, 1989]

ORDER

HON. WILLIAM J. BAUER, Chief Judge
HON. KENNETH F. RIPPLE, Circuit Judge
HON. DANIEL A. MANION, Circuit Judge

On consideration of the petition for rehearing filed in the above-entitled cause by Plaintiffs-Appellees, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 83 C 5685

ALBERT ROBINSON, WILLIE MOORE,
and JOHN RICHARDSON,
individually and on behalf of a class

Plaintiffs,

v.

CITY OF CHICAGO, et al.,

Defendants.

MEMORANDUM OPINION

The cause is before the court on the motion of defendants Mannion and Whalen to dismiss plaintiffs' first amended complaint. Of course, the complaint should be dismissed for failure to state a claim only if it appears beyond doubt that plaintiffs can prove no set of facts which woud entitle them to relief. *Conley v. Gibson*, 355 U.S. 41 (1957). After carefully reviewing the first amended complaint, the court concludes that plaintiffs can conceivably prove a set of facts showing that defendants arbitrarily incarcerated them without legal justification. The grounds for dismissal that defendants raise in their motion would make it necessary for the court to consider improperly matters extrinsic to the complaint. Consequently the motion to dismiss must be denied without prejudice to defendants' right to file a properly support motion for summary judgment.

Dated: February 3, 1984

George N. Leighton
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 83 C 5685

ALBERT ROBINSON, WILLIE MOORE,
and JOHN RICHARDSON,
individually and on behalf of a class

Plaintiffs,

v.

CITY OF CHICAGO, et al.,

Defendants.

MEMORANDUM OPINION

Plaintiffs brought this two-count, 42 U.S.C. §1983 action, alleging in Count I that defendants, police officers Mannion and Walen, unlawfully detained plaintiffs Moore and Robinson in violation of their Fourth Amendment rights. Count II, against the defendant City, alleges that plaintiff Richardson was unlawfully detained, pursuant to an alleged unconstitutional General Order of the defendant city's police department, in violation of his Fourth Amendment rights. Plaintiffs Moore and Robinson seek compensatory damages. Plaintiff Richardson seeks compensatory damages for himself and declaratory relief in favor of himself and those similarly situated. Defendants move to dismiss the second amended complaint.

As to Count I against defendants Mannion and Whalen, the court had previously ruled that plaintiffs' allegations in the first amended complaint were sufficient to withstand a motion to dismiss. *Robinson v. City of Chicago, et al.*, 83 C 5685 (N.D. Ill. Feb. 3, 1984). The second amended complaint leaves Count I unaltered, accordingly, as to Count I,

defendants' motion to dismiss is denied.

Count II is a claim brought by plaintiff Richardson against the City of Chicago. Defendant urges three arguments in support if its motion to dismiss; (1) plaintiff lacks standing; (2) plaintiff has not sufficiently alleged a policy of the defendant City to unlawfully detain; and (3) the facts of the case indicate that plaintiff's detention was not and unreasonable delay.

Defendant reasons that plaintiff's prayer for declaratory relief both for himself and the prospective class is moot since the alleged unconstitutional practices are based on past conduct and therefore plaintiff lacks standing. However, the mootness doctrine is not strictly applied were the challenged action is "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC*, §29 U.S. 498, 515 (1911); *see also, Roe v. Wade*, 410 U.S. 113, 124-25 (1973). Since plaintiff seeks to represent a class of similarly situated individuals who may be unconstitutionally detained for a relatively short period of time, pursuant to the General Order, this is certainly a case "capable of repetition, yet evading review." *Lewis v. Tully*, 99 F.R.D. 632 (N.D. Ill. 1983); *see also, LaDuke v. Nelson*, 726 F.2d 1318, 1326 (9th Cir. 1985).

Defendant's second argument, that plaintiff has failed to sufficiently allege a policy of unconstitutional behavior, is likewise without merit. Plaintiff bases his claim on a General Order of the defendant City's police department. The court reads that Order in such a way that plaintiff may conceivably prove a set of facts showing that defendant, pursuant to that order, arbitrarily incarcerated him, and without legal justification.

Finally, defendant argues that the extended detention of plaintiff was justified when looking at the entire circumstances of the case. Defendant, in making that argument, requires the court to consider matters extrinsic to the

complaint. Such consideration would be improper when ruling on a motion to dismiss. *Greene v. Finley*, 749 F.2d 467 (7th Cir. 1984). The allegations in the complaint do not support defendant's argument that the detention was justified and not unreasonably delayed.

Accordingly, defendants' motion to dismiss is denied without prejudice to the right to file a properly supported motion for summary judgment.

So Ordered,

Dated: Nov. 20, 1985

George N. Leighton
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 83 C 5685

ALBERT ROBINSON, WILLIE MOORE,
and JOHN RICHARDSON,
individually and on behalf of a class

Plaintiffs,

v.

CITY OF CHICAGO, et al.,

Defendants.

MEMORANDUM OPINION

Plaintiffs bring this action pursuant to 42 U.S.C. §1983. Richardson, the only plaintiff in Count II, alleges that on July 18, 1981, he was unlawfully detained, pursuant to an unconstitutional General Order of the defendant City's police department, in violation of his Fourth Amendment rights. The cause is not before the court on his motion for class certification. He seeks to represent "all persons who from August 17, 1978 to the time of entry of judgment were held in custody without the filing of charges pursuant to Section 6, paragraph c-2 of General Order 78-1 of the Chicago Police Department."

General Order 78-1, paragraph C-2, permits the defendant City to detain arrestees when "there is a necessity for the detention . . . for a period of time longer than that which might routinely be expected, in order that they may continue investigation . . ."

It is well established that a court can certify a class only when the proposed representative satisfies each of the four requirements set forth in Fed.R.Civ.P. 23(a), together with at

least one of the requirements stated in Fed.R.Civ.P. 23(b). *See, e.g., Issen v. GSC Ind., Inc.*, 522 F.Supp. 390, 400-01 (N.D. Ill. 1981). In addition, there is the implied requirement in Rule 23(a) that the class be sufficiently definable. *See Adashunas v. Negley*, 626 F.2d 600, 603-04 (7th Cir. 1980).

Turning first to the class definition, the primary concern underlying the requirement of definability is to insure that the proposed class is not amorphous, vague or indeterminate. 1 Newberg, *Newberg On Class Actions*, 75 (1977). In this case, while defendant argues to the contrary, the proposed class is sufficiently definite. It will certainly be administratively feasible to determine whether a given individual has been detained pursuant to the General Order, so as to preclude the possibility of a vague and indeterminate class. Accordingly, the definability requirement is satisfied. *In Re Tetracycline Cases*, 107 F.R.D. 719, 728 (W.D. Mo. 1985).

Rule 23(a) contains four prerequisites to class certification: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims . . . of the representative parties are typical of the claims . . . of the class, and (4) the representative parties will fairly and adequately protect the interest of the class."

Numerosity

Defendant argues that plaintiff has failed to make a showing of numerosity and impracticability of joinder. However, plaintiff has submitted evidence, by way of deposition testimony, of a least twenty occasions of implementation of the General Order. Additionally, common sense indicates that the number of individuals subjected to a General Order of the police department in a city the size of Chicago, would be so great as to make joinder impractical. *Bartelson v. Dean Witter & Co.*, 86 F.R.D. 657, 676 (E.D. Pa. 1980). Accordingly, 23(a)(1) is satisfied.

Commonality

Rule 23(a)(2) does not require that all questions of fact and law be common to each and every member of the class, but merely that the class claims arise out of the same legal or remedial theory. *Patterson v. General Motors Corp.*, 631 F.2d 476, 481 (7th Cir. 1980). Accordingly, where defendant engages in a single course of conduct that adversely affects the class as a whole, the commonality requirement of 23(a)(2) is satisfied. *Edmonson v. Simon*, 86 F.R.D. 375 380 (N.D. Ill. 1980). In this case, defendant's implementation of the General Order adversely affects each member of the proposed class. Therefore, commonality exists and 23(a)(2) is satisfied.

Typicality

Rule 23(a)(3) requires the court to focus on whether plaintiff's claim has the same general characteristics as the class claims. In this case, since plaintiff's claim arises from the same course of conduct as the class claims, typicality exists and 23(a)(3) is satisfied. *De La Fuente v. Stokely Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983). This is so even though, as defendant points out, factual distinctions may exists between the named plaintiff's claim and those of the proposed class members. *Id.* at 232.

Adequacy of Representation

Rule 23(a)(4) mandates (1) that the class representative vigorously prosecute through qualified counsel and (2) that the interest of the proposed class representative not be antagonistic to those of the class. *In Re Tetracycline Case*, 107 F.R.D. at 728. Defendant concedes that plaintiff is represented by qualified counsel. However, it argues that plaintiff's claim is so personalized that it would be impossible for him to adequately protect the interest of the class and therefore he may be antagonistic to the class.

The court finds defendant's argument unpersuasive. Representation will normally be considered adequate and unantagonistic where the interests of the class representative and those of the class are co-extensive, that is, the representative and the class members "share a common objective and legal or factual positions." *Edmonson*, 86 F.R.D. at 381. Plaintiff certainly shares a common objective and legal or factual position with the proposed class members; they were all held pursuant to General Order 78-1 and seek a declaration of its unconstitutionality. Accordingly, the requirements of 23(a)(4) have been met.

With regard to the Rule 23(b) requirement, plaintiff seeks declaratory relief in favor of himself and those similarly situated. This type of class relief comes within 23(b)(2) and accordingly satisfies 23(b).

All of the requirements of Rule 23 having been satisfied, plaintiff's motion for class certification is granted.

So ordered,

Dated: Feb 21, 1986

George N. Leighton
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 83 C 5685

ALBERT ROBINSON, WILLIE MOORE,
and JOHN RICHARDSON,
individually and on behalf of a class

Plaintiffs,

v.

CITY OF CHICAGO, et al.,

Defendants.

MEMORANDUM OPINION

Plaintiffs bring this two-count, 42 U.S.C. § 1983 action, alleging in Count II, which names the City of Chicago as sole defendant, that one of them, John Richardson, was unlawfully detained under the purported authority of a General Order of the defendant city's police department, in violation of his Fourth Amendment rights. He seeks compensatory damages for himself, a declaratory judgment in his favor, and other similarly situated. the parties have filed cross-motions for summary judgment on Count II, insofar as it relates to the prayer for declaratory relief.

I

In the early morning hours of July 18, 1981, an apartment building, located at 636 West Barry, Chicago, Illinois, was partially destroyed by fire. Four residents were killed: seventeen others, as well as three City of Chicago fire department personnel, were injured. After some preliminary investigation, Sergeant James Lane of the Chicago Police Department arrested Richardson at about 2:10 p.m. on July 18, without a warrant, on the ground he was suspected of being

involved in the fire.

Following the arrest, Richardson was transported to Chicago Police department area 6, violent crimes headquarters. He remained there for three days without any charge being filed against him. His detention was by authority of Section 6, Paragraph C-2 of General Order 78-1 of the Chicago Police Department ("Paragraph C-2"). This paragraph, by its terms, permits Chicago Policemen to detain arrestees[1] when "there is a necessity for the detention . . . for a period of time longer than that which might routinely be expected, in order that they may continue the investigation." Finally, on the morning of July 21, 1981, Richardson was formally charged with murder. He was ultimately acquitted of all charges.

II

As a threshold matter, defendant argues that class representative Richardson cannot seek declaratory relief on behalf of the class because his claim is moot.[2] It therefore concludes that this suit, as to Count II must be dismissed for lack of subject mater jurisdiction. See e.g. *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 1383, 59

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1. The General Order defines "arrestee" as "a person taken into custody for the commission of an offense." Chicago Police Department, General Order 78-1, § 2, paragraph B.

2. A class was certified on February 21, 1986. Plaintiff Richardson represents "all persons who from August 17, 1978 to the time of entry of judgment were held in custody without filing of charges pursuant of Section 6, Paragraph C-2 of General Order 78-1 of the Chicago Police Department." *Robinson v. City of Chicago*, 83-5685, slip op. (N.D.Ill. Feb. 21, 1986) [Available on WESTLAW, DCTU database]. The class seeks a declaratory judgment that Paragraph C-2 violates the Fourth Amendment of the United States Constitution by permitting extended restraints of an arrestee's liberty without judicial determination of probable cause.

L.Ed. 2d 642 (1979).[3]

It is common practice to begin any discussion of the doctrine of standing, and the related doctrine of mootness,[4] by noting that Supreme Court precedent "may be said to be somewhat confusing, and that some, perhaps, are irreconcilable with others." *United States Parole Commission v. Geraghty*, 445 U.S. 388, 406, n. 11, 100 S.Ct. 1202, 1213, n. 11, 63 L.Ed.2d 479 (1980). Also see Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U.L.Rev. 1, 16 (1984). However, this caveat aside, it can be said with some certainty that the doctrine of mootness has two aspects; that is, two questions must be asked when determining whether the parties have legally cognizable interests in the outcome of the litigation ("personal stake"). *Geraghty*, 445 U.S. at 396, 100 S.Ct. at 1208; *Davis v. Ball Memorial Hospital Ass'n, Inc.*, 753 F.2d 1410, 1416 (7th Cir. 1985); *Lewis v. Tully*, 99 F.R.D. 632, 638 (N.D.Ill.1983). If either of these inquires is answered in the negative, the case is moot. *See Geraghty*, 445 U.S. at 396, 100 S.Ct. at 1208.

Defendant makes two mootness arguments. First, it calls the court's attention to a January 10, 1986 General Order

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3. Defendant City of Chicago apparently did not and does not now dispute that Richardson has a viable individual claim for money damages. Rather, it has questioned his ability to represent a class seeking declaratory relief.

4. Mootness has been defined as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *United States Parole Commission v. Geraghty*, 445 U.S. 338, 397, 100 S.Ct. 1202, 1209, 63 L.Ed.2d 479 (1980) (quoting *Monaghan, Constitutional Adjudication; The Who and When*, 82 Yale L.r. 1363, 1384 (1973)).

86-1 of the Circuit Court of Cook County Illinois which provides that "probable cause to detain hear[ings] shall be held promptly after arrest and shall be conducted in conformity with *Gerstein v. Pugh*, 420 U.S. 103 [, 95 S.Ct. 854, 43 L.Ed.2d 54] (1975)." From this defendant concludes that because plaintiff's claim is premised on defendant's detention policy, it is mooted by the General Order which specifically directs adherence to the Constitution, as construed in *Gerstein*. Apparently, it is defendant's position that because of these changed circumstances, plaintiff's claim is no longer "live."

A case may become moot when, because of changed circumstances, there is no "reasonable expectation" that the alleged violation will recur. *County of Los Angeles*, 440 U.S. at 631, 99 S.Ct. at 1383; *see also Watkins v. Blinzinger*, 789 F.2d 474, 483 (7th Cir.1986). However, in this case, the changed circumstance upon which defendant relies does not have that effect.

Plaintiff alleges that Paragraph C-2 of General Order 78-1 is unconstitutional. General Order 86-1, upon which defendant relies as the premise of its changed circumstance, in no way invalidates Paragraph C-2; it merely instructs that probable cause hearings must be held in accordance with *Gerstein*. Defendant has argued from the outset of this litigation that Paragraph C-2 conforms to the rule of law announced in *Gerstein*. It is therefore obvious that an order directing defendant's police officers to comply with the rule of *Gerstein*, which defendant insists it has always complied with, does not support the conclusion that there is no reasonable expectation that the alleged violation of rights of the class will recur. On the contrary, there is more than a reasonable expectation that class members will continually be detained pursuant to Paragraph C-2. Therefore, the controversy is "live." *Faheem-El v. Klincar*, 600 F.Supp. 1029, 1035 (N.D.Ill.1984).

Defendant's second mootness argument is premised on the "personal stake" requirement. *Geraghty*, 445 U.S. at 396, 100 S.Ct. at 1208. It takes the position that because Richardson's allegations of unconstitutional conduct are based on defendant's past acts, and since there is no reasonable likelihood that he will again be subjected to extended detention, the controversy between the parties is not of sufficient immediacy and reality to warrant the issuance of declaratory relief on behalf of the class, that is the parties lack a legally cognizable interest in the outcome. Therefore, the claim is moot, so the argument goes. *Geraghty*, 445 U.S. at 396, 100 S.Ct. at 1208; *see also Golden v. Zwickler*, 394 U.S. 103, 108, 89 S.Ct. 956, 959, 22 L.Ed. 2d 113 (1969); *Barany v. Buller*, 707 F.2d 285, 287 (7th Cir. 1983).[5]

Generally, in a class suit seeking declaratory relief, the class representative must maintain the required personal stake in the litigation, at least up until the time of class certification, in order to avoid mootness and dismissal. *Sosna v. Iowa*, 419 U.S. 393, 403, 95 S.Ct. 553, 559, 42 L.Ed.2d 532 (1975). However, when the claim is "capable of repetition yet evading review," the name plaintiff may litigate the class action despite his loss of personal stake in the outcome. *Geraghty*, 445 U.S. at 398, 100 S.Ct. at 1209, *Gerstein v. Pugh*, 420 U.S. 103, 110, n. 11, 95 S.Ct. 854, 861, n. 11, 43 L.Ed.2d 54 (1975). This is true even where, as here, there is no reasonable likelihood that named plaintiff's

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5. The court addressed this argument when ruling on defendant City of Chicago's motion to dismiss. In doing so it concluded that the action was not moot. Defendant now asks the court to reconsider that ruling pursuant to the court's inherent poser to modify or rescind interlocutory orders prior to final judgment. *Peterson v. Hanson*, 569 F.Supp. 694, 695 (W.D. Wis.1983)

expired claims will recur. *Geraghty*, 445 U.S. at 398, 100 S.Ct. at 1209.

The Court considered this issue in *Gerstein*; a case remarkably similar to this one. Plaintiffs alleged that defendant's policy of extended post-arrest detention before trial, without opportunity for judicial determination of probable cause, violated the Fourth Amendment. They sought declaratory and injunctive relief. *Gerstein*, 420 U.S. at 107, 95 S.Ct. at 859. At oral argument it was revealed that named plaintiffs' pretrial detention, the basis of their claim, had ended; in fact, they were not even in custody at the time of class certification. Nonetheless, the cause was not moot because:

> Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivation, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly "capable of repetition, yet evading review." At the time the complaint was filed, the named [plaintiffs] were members of a class of persons detained without a judicial probable cause determination, but the record does not indicate whether any of them were still in custody awaiting trial when the District Court certified the class. Such a showing ordinarily would be required to avoid mootness. But this case is a suitable exception to that requirement. . . It it by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class. Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain. *Gerstein*, 420 U.S. at 110-11 n. 11, 95 S.Ct. at 861,

n. 11 (citations omitted).

The Supreme Court has therefore held that where, as in this case, a class seeks declaratory relief to the effect that certain of defendant's pretrial detention policies are unconstitutional and where, again as in this case, named plaintiffs were not in pretrial custody at the time of class certification, the cause nonetheless escapes mootness, even though they will most likely not be subjected to further pretrial detention.

This case presents the issue whether the reasoning of *Gerstein* can be extended one step further, that is, here named plaintiff was not only out of pretrial custody at the time of class certification but also at the time the action was filed. In *Lewis v. Tully*, 99 F.R.D. 632 (N.D.Ill. 1983), another judge of this court was presented with the same question.[6] The Court stated the issue was "whether a named plaintiff's failure to have a live claim at the time he or she files the complaint defeats standing even where the class as a whole has a live claim." *Lewis*, 99 F.R.D. at 639. It held that plaintiffs could maintain the class suit. *Id.* at 641.

The *Lewis* court reasoned that named plaintiffs suffering an actual concrete injury, as a result of defendant's allegedly illegal conduct, ensured an adequately adverse interest between the parties to satisfy the formalistic personal state requirement. *Lewis*, 99 F.R.D. at 640.[7] This court agrees

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6. In *Lewis*, class members were subjected to an allegedly illegal detention for very short intervals of time with no expectation of being further detained. The case was thus "capable of repetition [at least so far as the class was concerned], yet evading review."

7. The court also recognized the significant difference between individual actions and class suits. *Lewis*, 99 F.R.D. at 638-39. "We think it implicit in 'the capable of repetition, yet evading review' doctrine that the courts are to apply the 'personal stake' requirement flexibly, particularly in the context of a class action." *Id.* at 640.

with and adopts the reasoning of *Lewis*; it accordingly concludes that the case is not moot and is properly before the court. *Accord, Faheem-El v. Klincar*, 600 F.Supp. 1029, 1035-36 (N.D.Ill.1984); *contra; Williams v. City of Chicago*, 609 F.Supp. 1017 (N.D.Ill.1985). Therefore, the merits of the cross-motions for summary judgment must be addressed.

III

Summary judgment is appropriate only where the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party has the burden of establishing the lack of a genuine issue of material fact. *Korf v. Ball State University*, 726 F.2d 1222, 1226 (7th Cir.1984). In this case, both parties move for summary judgment. That does not establish however that there is no factual issue to be resolved and that one party or the other is entitled to judgment. Wright, Miller & Kane, *Federal Practice and Procedure*, §2720 (1983). The court must consider whether each party has satisfied its Rule 56(c) burden before judgment may be entered. *See* O *United States Trotting Ass'n v. Chicago Downs Ass'n. Inc.*, 665 F.2d 781, 785 (7th Cir.1981). It is with these rules in mind that the court considers the parties' motions.

Plaintiffs bring this action pursuant to 42 U.S.C. §1983. That statute provides remedies for deprivation of federal rights. Count II of the second amended complaint, the only count to which these motions are addressed, names the City of Chicago, a municipal corporation of the State of Illinois, as sole defendant. Municipalities can be sued pursuant to §1983 for monetary and declaratory relief where the alleged unconstitutional action implements an official policy or custom of the local governing body. *Monell v.. Department of Social Services*, 436 U.S. 658, 690, 98 S.Ct. 2018, 2035, 56 L.Ed.2d 611 (1978); *Jones v. City of Chicago*, 787 F.2d 200,

203 (7th Cir.1986). Since this case unquestionably involves an official policy of the defendant city, as the basis of the alleged unconstitutional action, the "policy or custom" requirement of plaintiffs § 1983 claim has been satisfied. *Monell*, 436 U.S. at 694, 98 S.Ct. at 2037. The remaining issue therefore is whether, as a matter of law, defendant's implementation of Paragraph C-2 deprives plaintiff of a federal right.

Plaintiff maintains that it is an illegal policy of extended detention, in violation of Fourth Amendment rights. Therefore, for the purpose of plaintiff's motion, the issue is whether Paragraph C-2, which provides that an arrestee taken into custody without a warrant but with probable cause, may be detained "for a period of time . . . in order that [police personnel] may continue investigation" of the crime, violates the Fourth Amendment.

In order to secure an individual the protection of the Fourth Amendment against unfounded invasions of liberty and privacy, probable cause[8] must ultimately be determined by a neutral and detached magistrate. *Gerstein*, 420 U.S. at 112, 95 S.Ct. at 862, (citing, *Johnson v. United States*, 333 U.S. 10, 13-14, 68 S.Ct. 367, 368-369, 92 L.Ed. 436 (1948)). However, in order to avoid any undue handicap on law enforcement bodies, "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of a crime, and for a brief period of

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8. The standard for valid arrest and detention is probable cause. It has been defined as sufficient facts and circumstances to lead a prudent man to believe that the suspect was committing or had committed a crime, *Gerstein*, 420 U.S. at 111, 95 S.Ct. at 861; "more than bare suspicion but less than virtual certainty." *United States v. Gerza-Hernandez*, 623 F.2d 496 (7th Cir. 1980).

detention to take the administrative steps incident to the arrest." *Llaguno v. Mingey*, 763 F.2d 1560, 1567 (7th Cir. 1985) (quoting Gerstein, 420 U.S. at 113-14, 95 S.Ct. at 863).

Once the suspect is in custody however, the justification for dispensing with a neutral party's judgment evaporates and the Fourth Amendment requires a prompt judicial determination of probable cause to justify extended restraint of a person's liberty.

> There no longer is any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate. And, while the State's reasons for taking summary action subside, the suspect's need for a neutral determination of probable cause increases significantly. When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection for unfounded interference with liberty. Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.

Gerstein, 420 U.S. at 114, 95 S.Ct. at 863. Therefore, while a "brief" detention to complete the booking process, and other paperwork, before presenting an arrestee to the magistrate is allowed, any "prolonged" or "extended" detention is not. *Llaguno*, 763 F.2d at 1567-68 (citing Gerstein, 420 U.S. at 113-14, 95 S.Ct. at 862-63.)

Paragraph C-2 permits the exact type of extended detention which the Court in *Gerstein* found repugnant to Fourth Amendment rights. It specifically provides that an arrestee's detention be extended beyond the time when he would normally be sent before a magistrate so that police officers may continue the investigation. The reasoning behind this policy

of extended detention is obvious; to build a case against a defendant while he is in jail. However, the teaching of *Gerstein* in this regard is clear-- hoping to build a case is not a permissible reason for jailing someone indefinitely. *Llaguno*, 763 F.2d at 1568.[9]

Defendant attempts to avoid the result reached today by arguing that because plaintiff Richardson was brought before the court without "unnecessary delay," in conformance with Fed.R.Crim.P.5(a) and Ill.Rev.Stat., ch. 38 §109-1(a) (1983), his detention could not have been unconstitutional and therefore his claim, as well as that of the class,, must fail. However, plaintiff's right to a probable cause hearing prior to extended detention is derived from the Constitution, not Rule 5(a) or §109. that they may have been complied with in Richardson's case does not escape the reality that Paragraph C-2 is on its face, contrary to the Fourth Amendment. *See Brown v. Fauntelroy*, 442 F.2d 838, 839 (D.C.Cir.1971).[10]

Defendant also places great emphasis on Richardson's arrest being with probable cause. However, that the original arrest was with probable cause does not satisfy the Constitutional requirement of judicial determination of probable cause prior to extended detention. *Gerstein*, 420 U.S. at 117-19, 95 S.Ct. at 864-65, *See also United States v. Garza*, 754 F.2d 1202, 1211 (5th Cir. 1985) (Goldberg, J., concurring). The Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest, regardless of whether the original

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9. While plaintiff Richardson's detention was not indefinite, it very well could have been; Paragraph C-2 places no upper limit on its extended detention.

10. The court expresses no opinion on the issue of whether Richardson was in fact taken before a court "without unnecessary delay."

arrest was supported by an officer's on-the-scene determination of probable cause. *Id.* 420 U.S. at 114, 117-18, 95 S.Ct. at 863. Paragraph C-2 permits police officers to circumvent this requirement and for that reason is contrary to the Fourth Amendment rights of those being detained.

Accordingly, there being no issue of material fact, and it appearing that plaintiff is entitled to judgment as a matter of law, his motion for summary judgment on Count II of the second amended complaint is granted; defendant's cross-motion for summary judgment is denied.

So ordered.

Dated: June 23, 1986

George N. Leighton
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 83 C 5685

ALBERT ROBINSON, WILLIE MOORE,
and JOHN RICHARDSON,
individually and on behalf of a class

Plaintiffs,

v.

CITY OF CHICAGO, et al.,

Defendants.

JUDGMENT ORDER

This action came on for hearing before the Court, Honorable George N. Leighton, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED AND DECREED AS FOLLOWS:

1. *Claims against Defendants Mannion and Whalen:* In accordance with a stipulation, all of plaintiffs' claims against defendants Phillip E. Mannion and Thomas Whalen are hereby dismissed with prejudice and without costs and without attorneys' fees.

2. *Monetary Claims against the City of Chicago*: Pursuant to the stipulation filed by the parties, judgment is hereby entered in favor of plaintiffs Robinson, Moore, and Richardson and against defendant City of Chicago in the amount of fifteen thousand dollars, exclusive of costs and attorneys' fees.

3. *Declaratory Judgment on behalf of a Class*: In accordance with the Court's order of June 25, 1986, the Clerk of the Court is directed to enter this decree as a final judgment in favor of the plaintiff class, defined as:

> All persons who from August 17, 1978 to the time of entry of judgment were held in custody without the filing of charges pursuant to Section 6, Paragraph C-2 of General Order 78-1 of the Chicago Police Department.

and against defendant City of Chicago with respect to the claim adjudicated herein.

4. *Declaratory Judgment*: The Court hereby declares that all persons who were held in custody without the filing of charges pursuant to Section 6, Paragraph C-2 of General Order 78-1 of the Chicago Police Department have been deprived by defendant City of Chicago of rights secured by the Fourth Amendment to the Constitution of the United States.

5. *Reservation of Jurisdiction*: Defendant City of Chicago has expressed its intention to appeal from this final decision. Accordingly, the Court expressly reserves jurisdiction to enter such further orders as may be required to effectuate the judgment entered in this case, and defers until final adjudication of the City's appeal the question of whether notice of any sort is appropriate, as well as determination of the amount of fees and costs due to plaintiffs' counsel for having prevailed in this cause.

Dated: December 19, 1986

George N. Leighton
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 86 C 4514

KARRIEM MUHAMMAD,

Plaintiff,

v.

CITY OF CHICAGO,

Defendants.

MEMORANDUM OPINION

Plaintiff was arrested for trespass and held in custody by Chicago police from December 9, 1984 until December 13, 1984, while police investigated his possible involvement in the sexual assault of a woman. Plaintiff was held in custody pursuant to Section 6, Paragraph C-2 of Chicago Police Department General Order 78-1 ("Paragraph C- 2"). That paragraph permits Chicago policemen to detain arrestees when "there is a necessity for the detention ... for a period of time longer than that which might routinely be expected, in order that they may continue the investigation."

In *Robinson v. City of Chicago*, 638 F. Supp. 186 (N.D. Ill. 1986), appeal pending No. 87-1146, a class action suit, this court held that Paragraph C-2 was contrary to the provision of the Fourth Amendment to the United States Constitution. The court then entered a final declaratory judgment in favor of the plaintiff class providing that all persons who were held in custody without the filing of charges pursuant to Paragraph C-2 had been deprived by the City of Chicago of rights secured by the Fourth Amendment.[1]

Plaintiff, member of the *Robinson* class, filed his first amended complaint in February 1987, alleging unlawful post-arrest detention in violation of his Fourth Amendment rights; he named the City of Chicago as defendant. Plaintiff now moves for partial summary judgment on the issue of liability. In support of his motion, he relies on the res judicata effect of the *Robinson* judgment. The motion can be granted only if no genuine issues of fact exist and plaintiff is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The following are the material facts not in dispute.

–II–

On December 9, 1984, plaintiff was arrested by the Cook County Hospital Police ("CCHP") for trespassing on hospital property. He was known to the CCHP because of his loitering on hospital premises. After plaintiff's arrest, the CCHP informed the Chicago Police Department that he fit the description of an offender who had sexually assaulted a woman in her car in the parking lot at Cook County Hospital on December 6, 1984. The CCHP further informed the Chicago police that plaintiff had been observed in the vicinity of this incident on the date and time of the occurrence. The assault victim, Dr. Deborah Lange, was 36 years old and employed as a surgeon at Cook County Hospital. She described her assailant as a male of unknown race, about 30

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1. The class in *Robinson*, which was certified pursuant to Fed.R.Civ.P. 23(b)(2), sought only declaratory relief while the named plaintiffs, Robinson, Moore, and Richardson, sought compensatory damages. Pursuant to a stipulation of the parties, judgment was entered in favor of each of the named plaintiffs in the amount of $15,000.

years of age, 5'8" tall, and weighing about 150 pounds; she never saw her assailant in a standing position. At the time of his arrest, plaintiff was described as a black male, 35 years of age, 6' tall, and weighing 190 pounds.

On December 9, 1984, plaintiff agreed to undergo a polygraph examination and in connection with that examination, he signed a waiver of liability discharging the city from any cause of action "resulting directly or indirectly or remotely from [the] examination." On December 9, it was determined by the Chicago police that plaintiff would be held past court call on December 10, 1984, because the polygraph examination was to be administered that day and to enable police to continue their investigation pursuant to Paragraph C-2. On December 10, 1984, in addition to the polygraph, plaintiff took part in a lineup of four men. The victim made a tentative identification of plaintiff, stating his voice and build were similar to that of the person who assaulted her.

On December 10, 1984, the Chicago police telephoned another aggravated criminal sexual assault victim, Nancy Roe. She was contacted in Indiana at her residence. Ms. Roe related that she would be willing to come to Chicago for a lineup on December 12, 1984, but that she would have to try to change previous plans and would call the station later in the day. Paragraph C-2 was again invoked and plaintiff was held past court call on December 11, 1984. Ms. Roe's husband called the police station at 10:30 a. m. on December 11, 1984, and related that because he and his wife lived 250 miles away and his wife was eight months pregnant, she would be unable to make the trip into Chicago. He agreed to have his wife view photographs sent to their residence. Again, on December 11, 1984, the police decided to hold plaintiff past the December 12, 1984 court call pursuant to

Paragraph C-2. Finally, on December 13, 1984, plaintiff was brought before a judge of the Circuit Court of Cook County and was released on his own cognizance.

–III–

In opposing plaintiff's motion for summary judgment, the city argues that: (1) plaintiff's signing a waiver of liability in connection with taking the polygraph precludes him from bringing this suit; (2) because the Robinson class limited its request for relief to a declaratory judgment, class members, such as plaintiff, are barred under principles of res judicata from seeking monetary damages;[2] and (3) because the police had probable cause to arrest plaintiff and questions of fact exist on the issue of whether plaintiff was actually held before taking him before a judicial officer, for an unconstitutionally long period of time, summary judgment is inappropriate. The court finds these arguments unpersuasive; each of them will be addressed in turn.

With regard to the first of these arguments, the waiver signed by plaintiff waives liability only for causes "resulting directly or indirectly or remotely from or by [the polygraph] examination," and it is clear that plaintiff's detention from December 10, 1984 to December 13, 1984, upon which this suit is based, was not a result of the polygraph examination given on December 10, 1984. The waiver therefore does not preclude this suit. *Cf. Newton v. Rumery*, 107 S.Ct. 1187

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2. The city notes that the plaintiff class in *Robinson* also sought injunctive relief, however, the second amended complaint in *Robinson* limits class relief to a prayer for a declaratory judgment.

(1987) (agreement waiving civil rights action arising out of arrest precluded plaintiff's subsequent suit).

As to the city's second argument, the declaratory judgment action brought by the class does not bar, under res judicata principles, subsequent litigation by class members seeking relief based on the same cause of action. *Smith v. City of Chicago*, 820 F.2d 916, 919 (7th Cir. 1987) (citing *Mandarino v. Pollard*, 718 F.2d 845, 848 (7th Cir. 1983)). The rationale of this res judicata exception is that "the purpose of declaratory actions is to supplement other types of litigation by providing 'a remedy that is simpler and less harsh than coercive relief' [and] ... this purpose is furthered when a plaintiff who has sought 'solely' declaratory relief is later permitted to seek additional, coercive relief based on the same claim." *Mandarino*, 718 F.2d at 848 (quoting Restatement (Second) of Judgments [33, comment c); *see also Norris v. Slothouber*, 718 F.2d 1116, 1117 (D.C. Cir. 1983); *Crowder v. Lash*, 687 F.2d 996, 1006- 1009 (7th Cir. 1982); *In Re Jackson Lockdown/MCO Cases*, 568 F. Supp. 869, 892 (E.D.Mich. 1983) ("every federal court of appeals that has considered the question has held that a class action seeking only declaratory and injunctive relief does not bar subsequent individual suits for damages based on the same or similar conditions"). The city's res judicata argument is without merit.

In the city's final argument in opposition to plaintiff's motion, it takes the position that because plaintiff was arrested with probable cause and questions of fact exist on the issue whether he was actually detained, prior to being taken before a judicial officer, for an unconstitutional length of time, summary judgment is inappropriate. It reasons that merely because Paragraph C-2 may have authorized an

unconstitutional detention, liability does not attach unless plaintiff was in fact detained unconstitutionally. Citing *City of Los Angeles v. Heller*, 106 S.Ct. 1571 (1986). In this regard, it concludes that plaintiff was held with probable cause and his detention did not deprive him of constitutional rights.

The city's argument misses the point. First, that plaintiff may have been arrested with probable cause is irrelevant, "the Fourth Amendment requires a judicial determination for probable cause as a prerequisite to extended restraint of liberty following arrest regardless of whether the original arrest was supported by ... probable cause." *Robinson*, 638 F. Supp. at 193. Second, no question of fact exists concerning the issue whether plaintiff's detention, prior to being taken before a judicial officer, was "extended" and thus unconstitutionally lengthy.

When a person is arrested with probable cause a brief period of detention in order to complete the process of booking and other paperwork before taking him before a judicial officer is constitutionally permissible, however, any prolonged or extended detention is not. *Robinson*, 638 F. Supp. at 192 (citing *Llaguno v. Mingey*, 763 F.2d 1560, 1567-68 (7th Cir. 1983). It is a violation of the arrestee's Fourth Amendment rights to detain him, without judicial determination, for a period of time longer than which might routinely be expected to complete the booking process and this is exactly what Paragraph C-2 authorizes. Therefore, because the city held plaintiff pursuant to the authority of Paragraph C-2, it, by its own admission, delayed his appearance before a judicial officer for a time, in the words of Paragraph C-2, "longer than that which might routinely be expected." In other words, when Paragraph C-2 is invoked, an

unconstitutionally extended detention takes place. *Cf. Heller*, 106 S.Ct. at 1573 (the existence of unconstitutional regulations do not establish liability if their authority is *not* invoked). For that reason, the city violated plaintiff's Fourth Amendment rights. Accordingly, there being no issues of material fact and it appearing that plaintiff is entitled to judgment as a matter of law, his motion for summary judgment on the issue of liability is granted.

Dated: August 7, 1987

George N. Leighton
United States District Judge